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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CHRISTOPHER CLARK and JAMES
12 RENCIK

13 Plaintiffs,

14 vs.

15 CHASE HOME FINANCE, LLC; a
Delaware Corporation doing business in
16 California; CHASE MANHATTAN
MORTGAGE CORPORATION, a New
17 Jersey Corporation doing business in
California; JAMES BOUDREAU, an
18 individual; and DOES 1-25,

19 Defendant(s).

) Case No. 08-CV-0500 JM RBB
) (San Diego County Superior Court
) Case No. 37-2007-00883776-CU-OE-CTL)

) **PLAINTIFF'S NOTICE OF MOTION AND**
) **MOTION TO REMAND TO STATE COURT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT THEREOF;**
) **DECLARATION OF CHRISTOPHER CLARK;**
) **DECLARATION OF JAMES RENCIK**

) [Request for Judicial Notice filed concurrently
herewith]

DATE: May 16, 2008
TIME: 1:30 p.m.
COURTROOM: 16

20
21 **TO DEFENDANTS CHASE HOME FINANCE LLC, CHASE**
22 **MANHATTAN MORTGAGE CORPORATION, JAMES BOUDREAU AND**
23 **TO THEIR ATTORNEYS OF RECORD:**
24

25 PLEASE TAKE NOTICE THAT on May 16, 2008, at 1:30 p.m. or as soon thereafter as
26 counsel may be heard in Courtroom 16 of the above-entitled Court located at 940 Front Street, San
27 Diego, California, Plaintiffs CHRISTOPHER CLARK AND JAMES RENICK (hereinafter
28

1 "Plaintiffs") will and hereby do move this Court for an order remanding this matter to the state court,
2 pursuant to 28 U.S.C. 1447 (c).

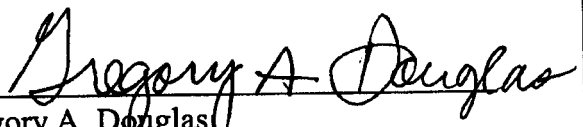
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4 This motion is made on the grounds that there is no basis for diversity jurisdiction pursuant to 28
5 U.S.C. 1441 since Defendant James Boudreau is a citizen of California. Further, the assertion by
6 Defendants that the inclusion of James Boudreau is a "fraudulent" [sham] joinder is misguided.

7
8 This motion will be based on the Notice of Motion, the attached Memorandum of Points and
9 Authorities, the Declarations of Christopher Clark and James Renick, the record and files of this
10 case, and any further oral or documentary evidence that may be introduced at the hearing of this
11 matter.

12
13 DATED: April 17, 2008

Respectfully submitted,

14 UNITED EMPLOYEES LAW GROUP, PC

15
16 By: 
17 Gregory A. Douglas
18 Attorneys for Plaintiffs
19 CHRISTOPHER CLARK and
20 JAMES RENICK
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs, CHRISTOPHER CLARK and JAMES RENICK (hereinafter "Plaintiffs")
 3
 4 hereby submit the following Memorandum of Points and Authorities pursuant to 28 U.S.
 5 1447(c) within thirty (30) days of removal to state court of the above-entitled action.

6 **A. GENERAL OVERVIEW**

7 Plaintiffs have filed a wage and hour complaint under California state law alleging causes
 8
 9 of action for Failure to Pay Overtime [Lab.C. §§ 510, 1194, 1198], Waiting Time Penalties
 10 [Lab.C. §§ 203, 558], Failure to Provide Accurate Itemized Statements [Lab. Code §226],
 11 Failure to Provide Rest Periods [Lab.C. § 226.7; IWC Wage Orders], Unfair Competition
 12 [B&PC § 17200-*et seq.*], and Constructive Trust.

13
 14 As part of that complaint, Plaintiffs named three defendants, specifically two entity
 15 defendants (CHASE FINANCE, LLC and MANHATTAN MORTGAGE CORPORATION),
 16 and one individual defendant (JAMES BOUDREAU). Defendants have sought to remove this
 17 matter to federal court on the basis of diversity jurisdiction. However, although defendants
 18 allege that diversity jurisdiction exists pursuant to 28 U.S.C. Section 1441(b) ("*Any other such*
 19 *action shall be removable only if none of the parties in interest properly joined and served as*
 20 *defendants is a citizen of the State in which such action is brought.*"), such is not the case.
 21 Defendant JAMES BOUDREAU is a citizen of California.

22
 23
 24 Defendants hope to establish diversity not with respect to Defendant Boudreau's
 25 citizenship, but by contending that Defendant Boudreau is a "sham" and/or fraudulently joined
 26 defendant. Defendant's arguments in that regard are incorrect and baseless, as stated infra.
 27
 28

1 **B. LEGAL ARGUMENT**

2 "Only state-court actions that originally could have been filed in federal court may be
3 removed to federal court by the defendant." Caterpillar Inc. v. Williams, 482 US. 386,392 (1987).
4 Pursuant to 28 U.S.C. § 1332, federal district courts are given original jurisdiction of all civil actions
5 "between . . . citizens of different States" where the amount in controversy exceeds \$75,000. The
6 provision "between . . . citizens of different States" requires complete diversity between all plaintiffs
7 and all defendants. Lincoln Property Co. v. Roche, 546 US. 81, 82 (2005).
8
9

10 **1. Fraudulent Joinder**

11 Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence will
12 be ignored for purposes of determining diversity, "[if the plaintiff fails to state a cause of action
13 against a resident defendant, and the failure is obvious according to the settled rules of the state."
14 McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir.1987). "[T]he question is simply
15 whether there is any possibility that plaintiff will be able to establish liability against the party in
16 question." Briano v. Consec Life Ins. Co., 126 F. Supp. 2d 1293,1296 (C.D. Cal. 2000); see also
17 Cont'l Ins. Co. v. Foss Mar. Co., No. C 02-3936, 2002 WL 31414315, at 6 (N.D. Cal. Oct.
18 23,2002) ("The standard is not whether plaintiffs will actually or even probably prevail on the
19 merits, but whether there is any possibility that they may do so."). Just as the removing party has the
20 burden of establishing federal jurisdiction, it has the burden of establishing fraudulent joinder.
21 Briano, 126 F. Supp. 2d at 1296.
22
23
24

25 Because Defendant Boudreau, like Plaintiffs, is a California citizen, his presence in the
26 lawsuit at the time of removal defeats diversity jurisdiction unless he was fraudulently joined.
27
28

1 Defendants argue that "...even if Plaintiff's could substantiate their allegations, California law is
2 clear that individual officers and directors are not personally liable as 'employers.'"

3
4 At the very least, there is a "possibility" that Plaintiff may be able to establish liability against
5 Defendant Boudreau under (1) Labor Code section 558 for failure to pay overtime, and (2) Business
6 and Professions Code section 17200 for unfair competition. These two claims are not clearly settled
7 under California law on the issue of corporate officer liability.
8

9 **Defendant's Reliance upon Reynolds and Jones is Misguided**

10 Defendants rely on Reynolds v. Bement, 11 6 P.3d 1162 (Cal. 2005), and Jones v. Gregory,
11 40 Cal. Rptr. 3d 581 (Ct. App. 2006), for the proposition that corporate officers acting within the
12 scope of their employment cannot be held personally liable under the Labor Code for failure to pay
13 wages, or for penalties based on wage claims. However, Defendants conveniently overlook the fact
14 that these cases, unlike the instant case, **involve claims arising prior to 2000**. Labor Code section
15 558(a), effective January 1, 2000, imposes liability for unpaid wages on an employer "or other
16 person acting on behalf of an employer." Both Reynolds and Jones raise the possibility that this
17 section would allow for the imposition of liability on a corporate officer.
18
19

20 The Reynolds court describes its holding as "narrow" and states that, while an employee may
21 not seek recovery under section 1194 of the Labor Code against a corporate officer for unpaid
22 wages, an employee might be able to bring such an action under section 558 of the Labor Code.

23 Reynolds, 116 P.3d at 1170-71. According to the Jones court:

24
25 As Justice Moreno observed in Reynolds, section 2699 [the Labor Code Private
26 Attorneys General Act of 2004], "in time, may provide workers with a mechanism for
27 recovering unpaid overtime wages through private enforcement of section 558,
28

1 which authorizes civil penalties for violations of the wage laws that include unpaid
2 wages from 'any employer or other person acting on behalf of an employer,' a
3 phrase conceivably broad enough to include corporate officers and agents in some
4 cases. " Jones, 40 Cal. Rptr. 3d at 590 (quoting Reynolds, 116 P.3d at 1174 (Moreno,
5 J., concurring)).

6 Based on these holdings, it cannot be said that it is "obvious according to the settled rules of
7 the state" that Plaintiff has failed to state a cause of action against Defendants Boudreau under
8 section 558 of the Labor Code. There is a possibility that Plaintiffs may prevail on their claims.
9

10 The same conclusion can be reached as to Plaintiff's Business and Professions Code claim.
11 Under section 17203 of the Business and Professions Code, an employee may obtain the equitable
12 remedy of restitution to recover payment of unlawfully withheld wages. Cortez v. Purolator Air
13 Filtration Prods. Co., 999 P.2d 706, 712 (Cal. 2000). As with Labor Code section 558, the question
14 of whether a corporate officer may be held liable under this section remains unsettled. See Jones,
15 40 Cal. Rptr. at 588 n.8 (raising the possibility of a section 17203 suit against an individual
16 corporate officer without addressing the merits of such a suit). Defendants have introduced no
17 evidence to the contrary.
18
19

20 Plaintiff's bring to the Court's attention *Kim v. Gallagher* (U.S. Dist. Ct., C.D. 07-05846,
21 Sept. 2007) and *Ross v. SGS Testcom* (U.S. Dist. Ct., E.D. 08-206, Apr. 2008), Request for Judicial
22 Notice filed concurrently herewith. Although the Court is not bound to follow the decisions of the
23 Central District and the Eastern District, it may look to those decisions for guidance.
24

25 In both *Kim* and *Ross*, the very same issue of an alleged "sham" joinder was before the courts
26 as Defendants have alleged in the case at bar. Moreover, the defendants in both *Kim* and *Ross* cited
27
28

1 and relied upon the holdings in *Reynolds v. Bement* and *Jones v. Gregory*, just as the Defendant's
2 in the case at bar rely upon those cases.

3
4 As set forth in the Orders in *Kim* and *Ross*, the holdings in *Reynolds* and *Jones* are
5 distinguishable from and not dispositive of the issues to be decided by this Court.

6 **2. Individual Defendant As Plaintiff's Employer**

7
8 Defendants further assert that Defendant Boudreau cannot be named as individual defendants
9 since they are not the Plaintiff's employer. However, Labor Code Section 558 (a) utilizes a broad
10 definition of "employer" for the purposes of wage and hour claims. In particular, the statute applies
11 to any employer or "other person acting on behalf of an employer who violates, or causes to be
12 violated, a section of this chapter or any provision regulating hours and days of work. . ."

13
14 Plaintiffs refer this Court to their declarations, attached hereto and incorporated herein by
15 reference, which outlines the direct control that Defendant Boudreau exerted over Plaintiff's
16 employment, including their wages, hours, and working conditions. Therefore, the broad application
17 of "employer" stated in Labor Code, Section 558 (a) would apply to Defendant Boudreau in this
18 case.
19

20 **3. Defendant's contention that Plaintiff's Cannot Sustain Their Private Attorney**

21 **General Act Claim Against Boudreau is Misguided.**

22
23 Defendant's contention that "California law is clear that PAGA claims are subject to a
24 one year statute of limitations" (Defendant's Notice of Removal, page 10, line 20, and their
25 reliance upon the holding in *Thomas v. Home Depot USA, Inc.*, No. C06-02705 (2007) is
26 misguided as the holding in *Thomas* is distinguishable from the facts before this Court in that the
27
28

1 Plaintiff in *Thomas* had specifically amended his complaint to make clear that he brought his
2 claims pursuant to section 2699 of the Labor Code.

3
4 In the case at bar, there has been no such amendment by Plaintiffs. Moreover, Plaintiff's
5 sixth cause of action merely sets forth the facts establishing that Plaintiff's have complied with the
6 requirements of Labor Code, Section 2699.3(a)(1) and are therefore able to pursue claims against
7 Defendants pursuant to the provisions of Labor Code §§ 2698-2699.5, commonly known as the
8 Labor Code Private Attorney General Act of 2004.

9
10 Finally, the third cause of action of Plaintiff's First Amended Complaint states a cause of
11 action for violations of Labor Code, section 226 as against all defendants, not as a claim under
12 Labor Code, section 2699, though that latter section is cited elsewhere.

13
14 Plaintiff's bring to the Court's attention the Order in *Williams v. The Home Depot, Inc.* (U.S.
15 Dist. Ct., C.D., 07-1925, January 28, 2008). Request for Judicial Notice filed concurrently herewith.
16 Again, Although the Court is not bound to follow the decision of the Central District, it may look
17 to the decision for guidance.

18
19 In *Williams*, the Judge in the Central District considered the very same argument regarding
20 the citation of *Thomas v. Home Depot*, supra, for the proposition that Plaintiff's claim had been
21 brought as a claim under section 2699, which was for a civil penalty and thus subject to a one-year
22 limitations period. The Court in *Williams* distinguished the holding in *Thomas* based upon the fact
23 that the Plaintiff in *Thomas* had amended his complaint to bring all causes of action under section
24 2699. (See *Williams* Order, pages 7 and 8 and footnote 8 on page 8).

1 **4. Defendant's contention that Plaintiff Clark Released his Claims Against**
2 **Boudreau is Irrelevant to the Issue Before this Court.**
3

4 First, release agreements are specifically prohibited by Labor Code Section 206.5 which
5 states as follows:

6 206.5. No employer shall require the execution of any release of any
7 claim or right on account of wages due, or to become due, or made
8 as an advance on wages to be earned, unless payment of such wages
9 has been made. Any release required or executed in violation of the
10 provisions of this section shall be null and void as between the
11 employer and the employee and the violation of the provisions of
12 this section shall be a misdemeanor.
13

14 Second, the courts have consistently held such releases void and unenforceable as against public
15 policy.
16

17 Finally, assuming arguendo that Plaintiff Clark did sign a valid and enforceable release agreement,
18 there has not, and indeed cannot, been any contention that Plaintiff Renick signed a release agreement.
19 Therefore, there would still be a lack of diversity that would warrant removal of this case to District Court.
20

21 **C. CONCLUSION**
22

23 Because Defendants have failed to meet the high burden of showing "sham" and/or fraudulent
24 joinder, Plaintiff respectfully requests this Court to reject the Defendants' assertion of diversity jurisdiction,
25 and to remand this action to the state court.
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1 DATED: April 17, 2008

Respectfully submitted,

UNITED EMPLOYEES LAW GROUP, PC

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5 By: Gregory A. Douglas
6 Gregory A. Douglas
7 Attorneys for Plaintiffs
8 CHRISTOPHER CLARK and
9 JAMES RENICK
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